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IN THE

Supreme Court of the United States

October Term, 1959

No. 848

LUCKENBACH STEAMSHIP COMPANY, INC., *Appellant*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

On Appeal From the United States District Court,
District of Delaware

BRIEF OF LUCKENBACH STEAMSHIP COMPANY, INC., OPPOSING MOTIONS TO AFFIRM

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BRIEF OF LUCKENBACH STEAMSHIP COMPANY, INC., OPPOSING MOTIONS TO AFFIRM

Two motions to affirm have been filed, one on behalf of the United States and the Interstate Commerce Commission, the other (hereinafter referred to as "railroads' motion") on behalf of the other appellees. These motions seek the best of two irreconcilable worlds.

(1) The railroads' motion argues that the action is premature (pages 6-9), while the Government asserts that it is moot (page 4).

(2) The district court entered judgment dismissing appellant's complaint for want of jurisdiction. The motion to dismiss admitted the material allegations of the complaint,[1] that the Commission's refusal to suspend the rate was arbitrary and capricious and that the proposed reduced rail rate threatened appellant with immediate, serious and irreparable injury (R. 8, 9). And appellant sustained these allegations by proof, as it had to do in support of its motion for a temporary restraining order.[2] This proof was not controverted. On their motion, therefore, appellees' position was that, even if arbitrary and capricious, Commission refusal to suspend a rate is not reviewable (R. 110-111, 121-122, 130). And the court below so held: "So far as the action is by law committed to agency discretion it is not reviewable—even for arbitrariness or abuse of discretion." 179 F. Supp. 605, at 609, J. St. 6a.

Now appellees, on the one hand, argue that the Commission did not act arbitrarily (railroads' motion,

[1] *Myles Salt Co.* v. *Board of Commissioners*, 239 U.S. 478, 481 (1916). See also *Southern Music Pub. Co.* v. *Walt Disney Productions*, 73 F. Supp. 580, 582 (S.D.N.Y. 1947), *Knight* v. *Bolivar*, 156 F. Supp. 561, 563 (S.D.N.Y. 1957), *Amos* v. *Prom*, 115 F. Supp. 127, 131 (N.D. Iowa 1953), appeal dismissed 214 F. 2d 356.

[2] Thus, appellant showed, *inter alia*, the following: The Commission was told (without contradiction by the railroads) that the canned goods rate was intended to destroy appellant's competing service, was below the railroads' full costs, and, as the western railroads admitted, would result in an unnecessary sacrifice of rail revenues. The Commission itself recognized the questionable lawfulness of the rate by ordering an investigation. But, since the rate was to expire in one year and the Commission proceedings would consume most, if not all, of that period, the incomprehensible refusal to suspend permitted the rate to work its destructive effect and made the investigation an empty gesture.

pages 9-11) and, on the other hand (Government motion, page 5), seek to avoid or treat as inconsequential the basic fact that had to be assumed below and must now be assumed, namely, that the Commission's action was arbitrary and an abuse of discretion.

I. The Decisional Conflict

The Solicitor General argues that there is no conflict of decision below, relying on a distinction between jurisdiction to review the Commission's arbitrary refusal to suspend (this case) and the Commission's arbitrary vacation of a suspension order (many cases upholding jurisdiction to review). But both a refusal to suspend and the power to vacate suspension derive from the same language in Section 15 (7) of the Interstate Commerce Act, 49 U.S.C. § 15 (7). If the fact that the power to suspend is "by law committed to agency discretion" does not preclude review of the vacation of a suspension order, then it likewise does not preclude review of a refusal to suspend.

The Solicitor General himself has twice so argued in direct appeals in this Court.

> "While the decision below deals immediately with an order of the Commission vacating its prior suspension order, its rationale appears to be equally applicable to orders originally suspending or refusing to suspend rates."[3]

Now, without explanation or even a suggestion that his position has changed, the Solicitor General asserts the

[3] See the Solicitor General's jurisdictional statement in United States v. Amarillo-Borger Express, 352 U.S. 817 (1956). The same argument was made by reference in his jurisdictional statement in United States v. Dixie Carriers, 353 U.S. 906 (1957). Both appeals were eventually dismissed as moot 352 U.S. 1028 (1957), 355 U.S. 179 (1957).

absence of a conflict upon the sole ground that there is a conclusive distinction between cases involving orders vacating a prior suspension and those involving refusal to suspend in the first instance. He does not support the asserted distinction; or even argue that there is a difference in principle.

Moreover, even taking the Solicitor General's distinction, the conflict among the three-judge district courts is nevertheless substantial. It was expressly recognized with respect to this very case by the court in *Bison Steamship Corp.* v. *United States*, 182 F. Supp. 63, 66 (N.D. Ohio 1960), quoted in our Jurisdictional Statement, p. 6. Both *Seatrain Lines* v. *United States*, 168 F. Supp. 819 (S.D.N.Y. 1958), and *Marine Transport Lines* v. *United States*, 173 F. Supp. 326 (D.C. 1959), reversed the mere refusal to suspend. The court in *Seatrain* said (p. 828):

> "There is nothing in the statute or in the cases which would deprive the court of jurisdiction to direct the suspension of such unlawful rates under these circumstances. The court does not lack such jurisdiction."

The Solicitor General attempts to deal with *Seatrain* and *Marine Transport* by claiming that they involve inadequate findings under the long-and-short-haul clause of Section 4 of the Interstate Commerce Act, 49 U.S.C. § 4. The attempted distinction confuses jurisdiction to review with the substantive ground for reversal. The fact that the Commission's findings in *Seatrain* and *Marine Transport* were inadequate was the basis for the holding that its refusal to suspend was arbitrary. Here the motion to dismiss conceded, and the court assumed, that the refusal to suspend was arbitrary. The basic question of jurisdiction to review is identical. As to that, *Seatrain* and *Marine Trans-*

port held that the arbitrary refusal to suspend is reviewable. The court below held that it is not.

The conflict is broad and deep. Opposed to the decision below and the other cases standing categorically against reviewability are the following:

Inland Steel Co. v. *United States*, 306 U.S. 153, 159 (1939).

> An interlocutory injunction issued by a three-judge court against the Commission and the railroads, directing suspension of a tariff provision, was upheld as a lawful exercise of the district court's equity jurisdiction to review Commission action, though the permanent injunction was denied on the merits.

Seatrain Lines v. *United States*, 168 F. Supp. 819, 828 (S.D.N.Y. 1958).

> A three-judge court reviewing a Commission order refusing to suspend, held: "There is nothing in the statute or in the cases which would deprive the court of jurisdiction to direct the suspension of such unlawful rates under these circumstances. The court does not lack such jurisdiction."

Marine Transport Lines, Inc. v. *United States*, 173 F. Supp. 326 (D.C. 1959).

> A three-judge court issued a temporary restraining order directing suspension, and, at the conclusion of the litigation, a permanent injunction against the Commission and the railroads.[4] See fn. 1, pp. 327-328.

[4] During the course of the litigation the court had dissolved the temporary restraining order—not for want of jurisdiction to direct suspension but because there was an insufficient showing of irreparable injury.

Amarillo-Borger Express v. *United States*, 138 F. Supp. 411 (N.D. Tex. 1956).

A three-judge court, after a detailed discussion of its jurisdiction, set aside an order vacating suspension, directed suspension, and enjoined the use or application of the thus suspended tariff rates.

Long Island Rail Road Company v. *United States*, 140 F. Supp. 823, 827 (E.D.N.Y. 1956).

A three-judge court followed *Amarillo-Borger, supra*, directed suspension, and stated the general rule as ". . . the refusal or granting of suspension is a matter confided to the discretion of the Commission and no court has jurisdiction to review the Commission's decision unless it has refused to exercise discretion or has exercised it arbitrarily.".

Pacific Inland Tariff Bureau v. *United States*, 129 F. Supp. 472 (D.C. Ore. 1955).

A three-judge court issued a temporary restraining order enjoining railroads and the Commission from putting into effect disputed rates and, after consideration of its jurisdiction, made the injunction final and permanent.

Cantlay & Tanzola v. *United States*, 115 F. Supp. 72 (S.D. Calif. 1953).

A three-judge court denied a motion to dissolve its temporary restraining order enjoining the railroads and the Commission from putting the reduced rates into effect.

The need for resolution of the conflict is sharpened by the increasingly expressed doubts as to earlier, sweeping assertions of judicial impotence in the face of administrative arbitrariness, pointed out at pages 6-7 of appellant's Jurisdictional Statement.

II. Arbitrary Refusal to Suspend Is Reviewable

The view that the arbitrary refusal to suspend is wholly immune from judicial review rests exclusively upon (1) a self-defeating interpretation of section 10 of the Administrative Procedure Act (5 U.S.C. § 1009) excepting from review agency action "by law committed to agency discretion," and (2) a confusion as to jurisdiction to enjoin rates as an original matter and, on the other hand, to review agency refusal to suspend rates.

1. Section 10 of the Administrative Procedure Act.

The court below accepted, and the Government still urges, the view that, because section 15(7) of the Interstate Commerce Act provides that the "Commission may from time to time suspend," the action of suspension is by law committed to agency discretion and, therefore, immune from judicial review under the preamble to Section 10 of the Administrative Procedure Act.

Section 10 of the Administrative Procedure Act provides in relevant part:

> "Except so far as . . . (2) agency action is by law committed to agency *discretion*—
>
> * * *
>
> "(e) . . . [the court shall] (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, and abuse of *discretion*, or otherwise not in accordance with law . . ." (Emphasis added)

The quoted provisions are seemingly inconsistent with each other. If agency action committed to agency discretion is excepted from the review provisions of Section 10(e), it is difficult to understand in what

cases a court is empowered to set aside an abuse of discretion. The inconsistency is, however, more apparent than real. What was actually intended was that the court was not to substitute its discretion for that of the agency but, nevertheless, was to retain its traditional power to correct agency abuse of discretion. This is borne out by the legislative history set out in the footnote below, quoted in part from *Amarillo-Borger Express* v. *United States*, 138 F. Supp. 411, 418 (N.D. Tex. 1956).[5]

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[5] Senator Donnell asked the following question of Senator McCarran, who was in charge of the legislation:

> "Mr. Donnell: I should like to ask the distinguished Senator a question. Section 10 [now 5 U.S.C.A. § 1009] of the bill recites in part that—
>
> "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> • • •
>
> "... The point to which I request the Senator to direct his attention is this: In a case in which a person interested asserts that, although the agency does have a discretion vested in it by law, nevertheless there has been abuse of that discretion, is there any intention on the part of the framers of this bill to preclude a person who claims abuse of discretion from the right to have judicial review of the action so taken by the agency?
>
> "Mr. McCarran: Mr. President, let me say, in answer to the able Senator that the thought uppermost in preparing this bill is that where an agency without authority or by caprice makes a decision, then it is subject to review.
>
> • • •
>
> "Mr. Donnell: But the mere fact that a statute may vest discretion in an agency is not intended, by this bill, to preclude a party in interest from having a review in the event he claims there has been an abuse of that discretion. Is that correct?
>
> "Mr. McCarran: It must not be an arbitrary discretion. It must be a judicial discretion; it must be a discretion based on sound reasoning."

The view that, because the power to suspend is discretionary, abuse of discretion is excepted from judicial review is in conflict with, and far less cogent than the holding in *Amarillo-Borger Express* v. *United States, supra*, at p. 418, that—

> "A proper regard for the whole reach of the Administrative Procedure Act and its long legislative history will not support an argument which would automatically remove from its protection substantially every administrative agency to whom was entrusted judgment and discretion in its administrative decision."

And the *Amarillo-Borger* analysis of the statute was specifically approved in *Long Island Rail Road Co.* v. *United States*, 140 F. Supp. 823, 829 (E.D.N.Y. 1956).

2. Original Power to Enjoin v. Jurisdiction to Review.

The sweeping rejection below of jurisdiction to review arbitrary refusal to suspend is based upon four other three-judge district court cases.[6] They in turn are all based on a misreading of *Board of Railroad Com'rs.* v. *Great Northern Ry. Co.*, 281 U. S. 412 (1930). This aberration from the normal rule of judicial review is founded on error.

The *Great Northern* case involved intrastate rail rates which the North Dakota Commission had ordered reduced. The carriers attacked the rates before the Interstate Commerce Commission and concurrently instituted a suit in the district court to enjoin the order of the State Commission pending completion of the

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[6] *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va. 1935); *Carlson* v. *United States*, 107 F. Supp. 398 (S.D.N.Y. 1952); *National Water Carriers Ass'n* v. *United States*, 126 F. Supp. 87 (S.D.N.Y. 1954); *Coastwise Line* v. *United States*, 157 F. Supp. 305 (N.D. Calif. 1957).

I.C.C. proceedings. The Interstate Commerce Commission was not a party to the suit and no question of arbitrary action by it was involved. The Court held (pp. 426-427):

> "We find no basis for the conclusion that it was the purpose of Congress to interdict a state rate, otherwise lawfully established for transportation exclusively intrastate, before appropriate action by the Interstate Commerce Commission."

The case thus had nothing to do with review of the Interstate Commerce Commission's refusal to suspend a rate, or indeed review of any other Interstate Commerce Commission action.[7]

The Court, however, discussed the question whether there was original judicial jurisdiction to enjoin a proposed rate. It pointed out that prior to 1910 the Interstate Commerce Commission had no suspension power; that there had been a conflict among the district courts as to their jurisdiction to enjoin a proposed rate as an original matter pending an Interstate Commerce Commission proceeding; and that the Mann-Elkins Act of 1910 (section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7)) gave the Commission the power to suspend a rate pending investigation. It was in this context that Chief Justice Hughes said "This power of suspension was entrusted to the Com-

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[7] The court below made no reference to *Great Northern* but (179 F. Supp. at page 609, J. St. 7a) relied upon *M. C. Kiser Co. v. Central of Ga. Ry. Co.*, 236 F. 573 (S.D. Ga. 1916), aff'd 239 F. 718 (5th Cir. 1917), which, like *Great Northern*, involved no question of review of refusal to suspend or of any other action of the Interstate Commerce Commission. The court merely held that it had no jurisdiction, as an original matter, to enjoin a railroad rate prior to action by the Commission.

mission only",[8] meaning that, whatever the situation theretofore, the courts no longer had original jurisdiction to enjoin rates.

The Chief Justice obviously implied that the power to suspend was entrusted to the Commission as a matter of primary jurisdiction and he certainly did not even suggest that judicial review was foreclosed. This is apparent not only from his statement, quoted above, that a state rate could not be interdicted "before appropriate action by the Interstate Commerce Commission", but also from his reference (pp. 422, 423) to *Texas & P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), which established the primary jurisdiction rule. And basic to that rule is the reviewability of agency action for the correction of arbitrari-

[8] Chief Justice Hughes' full statement (pp. 429-430) is:

"When, before the Amendments of 1910 of the Interstate Commerce Act, the question arose as to the propriety of judicial action in granting injunctions against the maintenance of interstate rates, filed and published by carriers as provided by law, pending the decision of the Interstate Commerce Commission whether such rates were unreasonable or unjustly discriminatory, there was a conflict of opinion in the lower Federal courts, but the weight of decision was that such relief, although temporary in character, could not be granted prior to an appropriate finding by the Interstate Commerce Commission, and this ruling accorded with the principle declared by this court in the Abilene Cotton Oil Co. and other cases, supra. Congress, in 1910, authorized the Interstate Commerce Commission, on the filing of rates by interstate carriers with the Commission, to suspend the operation of the rates for a stated period, and this provision has been continued in later legislation. Interstate Commerce Act, § 15 (7); [June 18, 1910] 36 Stat. at L. 552, chap. 309; [February 28, 1920] 41 Stat. at L. 486, 487, chap. 91, U.S.C. title 49, § 15 (7). This power of suspension was entrusted to the Commission only. There is no similar provision for the suspension of intrastate rates established by state authority."

ness or other legal error. *United States* v. *Western P.R. Co.*, 352 U.S. 59, 63-64 (1956); *Far East Conference* v. *United States*, 342 U.S. 570, 574-575, 577 (1952); *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 139 (1939).

The language of the Court that the suspension power "was entrusted to the Commission only", divorced from its context, has been seized upon to justify a sweeping rejection of jurisdiction to review arbitrary Commission refusal to suspend. The resulting distortion calls for examination of the question by this Court and correction of the errors proliferated by the misreading of *Great Northern*.

III. Applicability of the Primary Jurisdiction Rule

The Solicitor General's avoidance of any discussion of the issue of the Commission's primary jurisdiction of the antitrust cause of action and his unsupported and patently unsupportable and irrelevant suggestion of an alternative judicial remedy (pages 6-7) amount to a confession of error. And there was vital error.

Appellant's antitrust cause of action did not allege that the railroads' collective rate-making procedures were themselves a violation of the Sherman Act. Indeed, it expressly alleged (R. 6) that such procedures were exempt from the antitrust laws by the Reed-Bulwinkle Act (section 5a of the Interstate Commerce Act, 49 U.S.C. § 5b). But Reed-Bulwinkle is a carefully circumscribed statute that lifts the ban of the antitrust laws only from the joint rate-making procedures themselves. The thrust of the complaint (R. 10) is that use of such procedures for the purpose and with the intent of destroying a competitor is, as it has been in the past, a violation of the antitrust laws. *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439 (1945).

Thus, whatever the scope of the exemption accorded a Commission-approved Reed-Bulwinkle agreement, the Commission is wholly without power to approve a rate-fixing agreement having as its intent and purpose the destruction of a competitor.

But the court below, although it recognized that Reed-Bulwinkle "certainly does not sterilize all forms of conspiratorial action," nevertheless applied the primary jurisdiction rule, saying "it is incumbent upon the court to seek the observations of the Commission with respect to the extent and scope of the exemption." 179 F. Supp. 605 at 614, J. St. 14a-15a. Thus, the court dismissed the antitrust cause of action solely on the basis of a referral to the Commission of an issue that was not in the case.

This holding is irreconcilable with *Atchison, T. & S.F. Ry. Co.* v. *Aircoach Transp. Ass'n*, 253 F. 2d 877, 887 (D.C. Cir. 1958), which held that the question of intent and purpose to destroy a competitor was to be tried by the district court and not by the Commission, saying, "We do not think the [Reed-Bulwinkle] Act or any agreement which has been approved under it can be construed as authorizing the use of such practices for the purposes of eliminating the competition of Aircoach. . . . Moreover, this aspect of the case need not be submitted for consideration or initial decision by the Commission as to either questions of fact or of law."[9]

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[9] In *Risse & Co.* v. *Association of American Railroads*, 170 F. Supp. 354, 365 (D.C. 1959) the court, following Aircoach, said:

> "On the second question, it was held in ACTA [Aircoach] that, under no circumstances could antitrust immunity under 49 U.S.C.A. § 5b(9) be held to apply to the use of approved procedures to set . . . rates if they were part of an effort by railroads in combination or conspiracy to eliminate the competition of Aircoach."

But even if, notwithstanding the contrary holding in *Aircoach*, application of the primary jurisdictional rule would otherwise have been appropriate, its mechanical invocation in the circumstances of the instant case was self defeating and erroneous. As this Court said in *United States* v. *Western P. R. Co.*, 352 U. S. 59, 63 (1956):

> "The doctrine of primary jurisdiction . . . is concerned with promoting proper relations between the courts and administrative agencies charged with particular regulatory duties."

And, reiterating a basic principle (p. 64):

> "In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation."

Application of the primary jurisdiction rule is inappropriate whenever it will defeat the purpose of the rule or impede rather than promote proper court-agency relationships. This was wholly overlooked in this case.

The means for the effectuation of the antitrust conspiracy was the reduced railroad rate that was designed to destroy appellant's competing service. The proposed rate, by its own terms, was to be in effect for only one year, ten months of which remained at the time of the decision below. There was no reasonable prospect that Commission proceedings relating to antitrust charges as well as to the lawfulness of the proposed rate, could be concluded within that time. In any event, it was certain that both Commission and court proceedings could not possibly be completed. Thus, application of the primary jurisdiction rule was

self defeating and improper since it made it impossible for either the Commission or the court to perform its function.[10]

But even if application of the primary jurisdiction rule had been proper, the court should have retained jurisdiction of the antitrust cause of action pending Commission proceedings. Dismissal seriously prejudiced appellant. The court relied upon *Far East Conference* v. *United States*, 342 U.S. 570 (1952), which expressly held that the dismissal there was appropriate because no prejudice would result.

On the other hand, where the dismissal would result in prejudice, the late Judge Fee, in *Bustos-Ovalle* v. *Landon*, 225 F. 2d 878, 881 n. 5 (9th Cir. 1955), stated:

> "In applying the doctrine of primary jurisdiction, the court may dismiss the complaint where the question involves an administrative question necessitating primary resort to the administrative tribunal. However, the presence of such an administrative question does not deprive the court of jurisdiction, and where there are rights which may be saved by retaining the cause, the court should do so but stay its hand pending the administrative determination."

Here the court had issued and, after argument had continued, a temporary restraining order against the railroads. Had the case been retained, the temporary restraining order might have been continued in effect.

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[10] If the Commission should hold that the railroads have not conspired or otherwise acted in violation of the antitrust laws, *query*, whether appellant would be limited to the three-judge court review procedure or would be free to pursue de novo its Sherman Act remedies, as in *United States* v. *Radio Corp. of America*, 358 U.S. 334 (1959); cf. *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439 (1945).

or appellant might have been granted a preliminary injunction. These remedies were denied appellant, not for want of merit but because the case was dismissed under an erroneous application of the primary jurisdiction rule.

IV. Mootness

The mootness point, referred to but not argued by the Government (page 4), it should be noted, does not affect the appeal from the dismissal of appellant's antitrust cause of action.

As to its relevance to review of the Commission's refusal to suspend, the short answer is that the railroads announced to the Commission on January 25, 1960, that they intend to file a tariff either cancelling the October 22, 1960, expiration of the reduced rate or further reducing the rate (Commission hearings pp. 25-26, 155-156; see also p. 969). The situation will then be precisely the same as that precipitated by the Commission's refusal to suspend in the fall of 1959. Accordingly, the present case is not moot.

> Where . . . interest[s] of a public character are involved under conditions that may immediately be repeated, thus giving the litigation a continuing character, . . . the mere fact that the particular subject matter of the instant cause has expired does not render the case moot.

Boggess v. *Berry Corp.*, 233 F. 2d 389, 391 (9th Cir. 1956), citing *Southern Pac. Term. Co.* v. *I.C.C.*, 219 U.S. 498, 515-516 (1911). To like effect see *Southern Pac. Co.* v. *I.C.C.*, 219 U.S. 433, 452 (1911), *Dyer* v. *S.E.C.*, 266 F. 2d 33, 47 (8th Cir. 1959), *Derringer* v. *Plummer*, 240 F. 2d 922, 925 (5th Cir. 1956), *Lansden* v. *Hart*, 180 F. 2d 679, 684 (7th Cir. 1950), cert. den.

340 U.S. 824; cf. *Ford Motor Co.* v. *United States*, 335 U.S. 303, 313 (1948).

If the instant appeal were dismissed as moot, appellant, after newly instituted proceedings, would again be met with the objection of mootness before completion of judicial review. Of the like frustration threatened in *Southern Pac. Term. Co., supra,* this Court said (p. 515):

> * * * The question[s] involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar), and these considerations ought not to be, as they might be, defeated, by short-terms orders, capable of repetition, yet evading review, and at one time the government, and at another time the carriers, have their rights determined by the Commission without a chance of redress.

See also *Dyer* v. *S.E.C., supra.*

Settlement by this Court of the issue of reviewability of Commission exercise of the suspension power, notwithstanding its substantiality, has been frustrated by mootness in the past. *United States* v. *Amarillo-Borger Express,* 352 U.S. 1028 (1957), *United States* v. *Dixie Carriers,* 355 U.S. 179 (1957). The instant appeal presents an unusual opportunity which, we submit, should be seized upon to determine this increasingly recurring question of far reaching importance.

V. Prematurity

To the Government's Scylla of mootness the railroads (pages 6-9) have juxtaposed the Charybdis of prematurity. The railroads' point likewise is without merit since appellant claimed to be injured by, and sought relief from, the failure of the Commission to

suspend the rate. As to that, the administrative action was final and the case was ripe for review.

Moreover, appellant alleged and proved without challenge that it was threatened by immediate, serious and irreparable injury. In the face of that threat, there was no administrative remedy to be exhausted as a prerequisite to judicial review. *Cantlay & Tanzola* v. *United States*, 115 F. Supp. 72, 76 (S.D. Calif. 1953), *Pacific Inland Tariff Bureau* v. *United States*, 129 F. Supp. 472 (Oreg. 1955), *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51, 55-56 (D.C. Cir. 1954), *cert. denied* 347 U.S. 990.

Indeed, what the railroads really are saying is that the action is premature until it becomes moot. For, at the time the action was commenced, the rate, by its own terms, was to expire a year later. There was no indication that the railroads would extend the effective period of the rate or publish a lower rate. Nor is it now known for what period the new tariff that the railroads intend to file will be effective. Thus, deferral of court action until termination of the administrative proceedings (hearings of which have not yet been completed) would have resulted in the case becoming moot before final judicial determination with respect to the tariff already filed and even perhaps with respect to the tariff to be filed.

VI. The "No Order" Argument

The assertion in the railroads' motion (page 8) that "The mere refusal to exercise its discretionary power temporarily to suspend the rate pending investigation is not an order subject to review" suggests that the Commission may immunize its actions from judicial review merely by labeling its action "refusal to order"

instead of "order". It is reminiscent of the negative order doctrine that *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 140-142 (1939), was thought to have laid to rest.

When the Commission said "no" to appellant's request for suspension, it made an order with as much force and effect, although with contrary results, as if it had said "yes." And it should be unnecessary even to discuss whether reviewability of action, fraught with consequences injurious to appellant, turns upon nomenclature, in light of the fact that agency action may constitute an order even though not so labeled. *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 416 (1942).

In any event, the label "order" actually has been affixed by the Commission to its document which granted appellant only partial relief by ordering an investigation of, but refusing to suspend, the proposed rate. J. St. 23a-24a.

CONCLUSION

The substantiality of the question presented by the instant case was recognized by this Court when it noted probable jurisdiction in *Amarillo-Borger* and *Dixie Carriers*, both *supra*. The question, moreover, is recurring frequently and the courts below are in irreconcilable conflict as to their jurisdiction. Again, as in *Amarillo-Borger* and *Dixie Carriers*, resolution of the issue by this Court is likely, in most instances, to be defeated by mootness. That bar, however, does not exist in this case which thus presents an almost unique opportunity to have the matter finally determined.

Likewise substantial and of growing importance is the broad question, never passed upon by this Court

and as to which there is a conflict below, of the accommodation of court-agency relationships vis-a-vis the Reed-Bulwinkle Act and the antitrust laws.

The motion to affirm should be denied and probable jurisdiction noted.

Respectfully submitted,

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June 7, 1960